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ON LEADING A HORSE TO WATER: NEPA AND THE FEDERAL BUREAUCRACY

Roger C. Cramton* and Richard K. Berg**

I. INTRODUCTION

THE process of change in complex social organizations is itself a highly complex phenomenon, and governmental agencies are not exempt from this general rule. Presidents and administrators may come and go, but the civil service—with its inherited policies, attitudes, and biases—is with us always.¹ Moreover, the process by which governmental decision makers gather information, consider alternatives, and balance conflicting values may have characteristics that are highly persistent over time. While it is desirable to overcome unnecessary bureaucratic rigidities, any attempt to improve this decision-making process must take into account some important practical limitations.

The National Environmental Policy Act of 1969 (NEPA)² provides a relatively successful case study of the possibilities, methods, and limitations on the process of change as applied to agencies of the federal government. NEPA was intended to make federal agencies more responsive to environmental considerations and values, which had been too frequently neglected in governmental decision-making. In the short time since its enactment, the Act has produced, in addition to a number of judicial victories that have been celebrated by

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1. The difficulties experienced in trying to change the habits and practices of the federal bureaucracy were concisely expressed by President Truman. Commenting upon the forthcoming inauguration of General Eisenhower, he said, "He'll sit there . . . and he'll say, 'Do this! Do that.' And nothing will happen. Poor Ike—it won't be a bit like the Army." S. OPOTOWSKY, *THE KENNEDY GOVERNMENT* 27 (1961).

2. 42 U.S.C. §§ 4321-47 (1970).

environmentalists,³ a dramatic change in the perspectives of a number of federal agencies.⁴ Even more change—the steady sure change that results from building new inputs, values, and arguments into the decision-making process—is around the corner.

Skepticism concerning the ability of government to respond to changed social attitudes and policies is widespread today. This is an age in which any governmental success story needs to be recognized, emphasized, and given currency. Thus, it is important to chronicle the success of NEPA as an example of the possibility of orderly social change. There may be lessons in this experience that reformers can put to use in other contexts.

But success is not without its dangers. Only the naive or zealous will perceive necessary and desirable change as cost-free and without negative side effects; NEPA is no exception. Although the experience thus far has been a healthy and successful one, there is danger that the spirit will be undermined—in some agencies—by a mere observance of form that fails to grapple with the underlying realities. Similarly, judicial zeal that interprets NEPA as imposing a detailed procedural code or as requiring the impossible of federal decision makers will frustrate effective regulation by the federal government at a time when vigorous regulation is badly needed. You can lead a horse to water, but it is more difficult to force him to drink; and even if he does, too much of a good thing is sometimes harmful.

This Article is concerned with the effect of NEPA on administrative decision-making. What benefits has NEPA conferred on us? What dangers have emerged? What questions remain to be clarified if NEPA's benefits are to be achieved while minimizing any negative side effects?

In many respects, NEPA resembles a constitutional charter.⁵ It

3. Some of the outstanding landmarks have been: *Natural Resources Defense Council, Inc. v. Morton*, 458 F.2d 827 (D.C. Cir. 1972) (environmental impact statement must consider all "reasonably available" alternatives, including those beyond the agency's own authority); *Arlington Coalition on Transportation v. Volpe*, 458 F.2d 1323 (4th Cir. 1972) (work on segment of interstate highway halted pending preparation of an environmental impact statement although highway project was in progress prior to effective date of NEPA); *Calvert Cliffs' Coordinating Comm., Inc. v. AEC*, 449 F.2d 1109 (D.C. Cir. 1971) (AEC rules governing consideration of environmental issues and relying on water quality standards set by other agencies held invalid under NEPA).

4. Insiders conversant with the Washington scene agree that the AEC and the Army Corps of Engineers have undergone a dramatic transformation since enactment of NEPA. Significant changes in the manner and substance of decision-making in the Departments of Defense, Interior, and Transportation have also been noted.

5. Hanks & Hanks, *An Environmental Bill of Rights: The Citizen Suit and NEPA*, 24 *RUTGERS L. REV.* 230 (1970): "In form, the National Environmental Policy Act is a statute; in spirit a constitution. . . . In sum, it does not seem farfetched to suggest that the . . . Act could well become our Environmental Bill of Rights."

states a general policy in lofty terms, outlines a fragmentary procedure for implementing that policy, and leaves questions of detail to the good sense of those who must live with and interpret its requirements. The Congress did not attempt to anticipate the administrative adaptation that would be required in applying the Act to the enormously varied activities of the federal government. Not a line, not even a word, is addressed to the transitional problem of applying NEPA's requirements to governmental actions that were virtually completed or long in motion at the time of enactment—situations in which it is obvious that commitments have been made that can be reopened only to a limited degree.⁶

The National Environmental Policy Act declares that

it is the continuing policy of the Federal Government . . . to use all practicable means and measures . . . in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans.⁷

The Act goes on to amplify somewhat this none-too-precise statement, and, in particular, sets out certain procedures that federal agencies must employ to achieve the goals of the statute. The most significant and controversial of these procedural demands is the requirement of section 102(2)(C) that each agency prepare, in connection with each major action "significantly affecting the quality of the human environment," a so-called "environmental impact statement" that must be available to other interested federal, state, and local agencies and to the public, and must "accompany the proposal through the existing agency review processes."⁸ From this mandate that the statement accompany the proposal through the review process, the Council on Environmental Quality (CEQ), which is given certain general

6. NEPA has been broadly applied to federal actions initiated prior to its effective date of January 1, 1970. *See, e.g.,* Calvert Cliffs' Coordinating Comm., Inc. v. AEC, 449 F.2d 1109, 1119-22 (D.C. Cir. 1971); Note, *Retroactive Application of the National Environmental Policy Act of 1969*, 69 MICH. L. REV. 732 (1971). The note of caution implicit in section 11 of the guidelines issued by the Council on Environmental Quality, 36 Fed. Reg. 7724, 7727 (1971), which requires agencies to shape further action in projects commenced prior to 1970 so as to minimize adverse environmental consequences, has not always been fully reflected in the decisions.

Although NEPA immediately imposed an increased burden on federal agencies, no additional funds were provided. Existing personnel have been required to shoulder the extra burdens, or new personnel have been hired by diverting funds for that purpose. Because of the lag in the budgeting and appropriations process, the fiscal year that began on July 1, 1972, offered the first opportunity for most agencies to obtain new resources for handling the burdens necessitated by NEPA.

7. NEPA § 101(a), 42 U.S.C. § 4331(a) (1970).

8. NEPA § 102(2)(C), 42 U.S.C. § 4332(2)(C) (1970).

responsibilities in the administration of the Act,⁹ has inferred the concept of the "draft impact statement," which must be circulated and made public for comment prior to the final agency decision.¹⁰

Three years have now passed since enactment of NEPA, and the sky, despite a multitude of doom-sayers, has not fallen. Environmental impact statements relating to nearly 3,000 agency actions had been filed with the CEQ as of May 31, 1972, and new statements are being received at the rate of about five per day.¹¹ In the first two years under the Act, NEPA generated forty-seven district court decisions, fifteen circuit court decisions, and three Supreme Court dissents, all involving judicial review of administrative actions.¹²

The experience under NEPA is now sufficient to permit a retrospective appraisal as well as a modest peek at the uncertain world that lies ahead. Our assessment is that the beneficial aspects of NEPA easily outweigh the limited negative effects, although the latter may increase if reviewing courts treat the NEPA requirements as either highly detailed, inflexible mandates or as all-purpose tools for reversing agency actions with which they have a policy disagreement.

II. BENEFICIAL EFFECTS OF NEPA

The beneficial aspects of NEPA are large in magnitude and relatively clear in nature.

First, NEPA is an important step in a national reordering of priorities. For the first time, Congress has declared that federal agencies must consider environmental values along with other relevant factors in making decisions. The isolation and parochialism that characterize some governmental agencies—the tendency to be totally absorbed in the agency's special mission or with its special constituencies—are partially displaced. The agency must now take a larger view of its functions, placing them in the broader perspective of "the continuing responsibility of the Federal Government to use all practicable means, consistent with other essential conditions of

9. NEPA directs agencies to consult with the CEQ concerning methods of ensuring that environmental values will be considered (§ 102(2)(B), 42 U.S.C. § 4332(2)(B) (1970)) and to assist the CEQ (§ 102(2)(H), 42 U.S.C. § 4332(2)(H) (1970)); and the CEQ is directed to review and appraise federal programs in light of NEPA's policy and to make recommendations to the President. Moreover, Exec. Order No. 11514, § 3, 3 C.F.R. 528 (1972), assigns the CEQ important functions in coordinating activities under NEPA and issuing guidelines for compliance with it.

10. The nature and content of the draft environmental impact statement are described in section 9(b) of the CEQ guidelines, 36 Fed. Reg. 7724, 7726 (1971).

11. 1972 ANN. REP. OF THE COUNCIL ON ENVIRONMENTAL QUALITY 247.

12. Information supplied to authors by Frederick R. Anderson, Editor, *Environmental Law Reporter*, Washington, D.C. More than 200 suits have been filed under NEPA. 1972 ANN. REP. OF THE COUNCIL ON ENVIRONMENTAL QUALITY 249.

national policy," to avoid degradation of the environment, to preserve "historic, cultural, and natural" resources, and to obtain "the widest range of beneficial uses of the environment without . . . undesirable and unintended consequences."¹³

Second, NEPA requires an "airing" of the issues involved in governmental decision-making. It opens formerly closed administrative procedures to public view and to public comment. This is especially true, of course, of those decisions relating to use and management of public property, where there are not, by and large, any statutory requirements for public hearings or other structured procedures for obtaining outside views and expertise. The opening or closing of defense installations,¹⁴ storage and transportation of nerve gas,¹⁵ and underground explosion of nuclear devices¹⁶ are merely examples of the many administrative actions that are now exposed to public scrutiny prior to the occurrence of the event because of NEPA's requirements.

Third, NEPA forces agencies to articulate and to explain their decisions. Agencies must not only invite and listen to outside comments, but they must in practice respond to such comments. If it is charged that a certain environmental damage is threatened by a given project, the environmental impact statement cannot safely ignore that assertion. The impact statement must either explain why the agency discounts the threat or why the benefits of the proposed project are believed to outweigh the dangers.¹⁷ The requirement that agencies examine outside comments and consider them carefully is likely to result in more thoughtful and informed decision-making.

Fourth, NEPA contains a built-in mechanism for leading the bureaucratic horses to environmental waters. While in theory an agency can draft an impact statement on the basis of a narrow program-oriented perspective and leave it to other agencies to supply the required "interdisciplinary approach"¹⁸ in their comments, it

13. NEPA § 101(b), 42 U.S.C. § 4331(b) (1970).

14. *E.g.*, *State Comm. To Stop Sanguine v. Laird*, 317 F. Supp. 664 (W.D. Wis. 1970). *Cf.* *Citizens for Reid State Park v. Laird*, 336 F. Supp. 783 (D. Me. 1972).

15. *See, e.g.*, *McQueary v. Laird*, 449 F.2d 608 (10th Cir. 1971).

16. The AEC's Amchitka Island weapons test inspired a number of appellate opinions involving environmental effects and public access to records bearing on the environmental problems. *See* *Committee for Nuclear Responsibility, Inc. v. Seaborg*, 3 BNA ENV. REP. CAS. 1126 (D.C. Cir. 1971), 3 BNA ENV. REP. CAS. 1210 (D.C. Cir. 1971), 3 BNA ENV. REP. CAS. 1256 (D.C. Cir. 1971), *motion for injunction denied*, 404 U.S. 917 (1971); *Mink v. EPA*, 464 F.2d 742 (D.C. Cir. 1971), *revd.*, 41 U.S.L.W. 4201 (U.S., Jan. 22, 1973).

17. *Lathan v. Volpe*, 2 ENV. L. REP. 20545 (W.D. Wash. 1972).

18. NEPA § 102(A), 42 U.S.C. § 4332(A) (1970).

seems unlikely that an agency would permit a proposal to get as far as the circulation of a draft statement without having pinpointed and considered the principal environmental objections that might be raised. To anticipate environmental implications adequately, many agencies are being forced to acquire new personnel with specialized training in environmental sciences; when these staff members are brought into the planning of projects at an early stage, the planning process will acquire a broader perspective. In time, the agency will develop an institutional viewpoint more sympathetic to environmental, as opposed to purely programmatic, values.

Admittedly, this is largely a prediction rather than an assessment of the present state of administrative decision-making. The agencies must guard against a natural but unfortunate tendency to permit the writing of impact statements to become a form of bureaucratic gamesmanship, in which newly acquired expertise is devoted not so much to formulating a project that meets the needs of the environment as to shaping an impact statement to meet the contours of the agency's preconceived program and to withstand the test of judicial review.

A great virtue of NEPA's requirements is that they build into the bureaucracy an instrument for orderly social change. Bureaucratic organizations that have had an effective program of any kind almost invariably develop a set of attitudes and belief patterns that enormously influence what they do.¹⁹ The personnel of the agency have undergone common experiences, they often share a common professional training, and they have devoted their careers to efforts premised on certain valued assumptions. Thus, a civil engineer who has devoted the better part of a lifetime to building new highways as quickly and cheaply as possible to meet the transportation demands of a generation of Americans is threatened when his basic premises are attacked. Were his efforts wasteful or harmful? The ability of any group of professionals to react positively to criticism of this sort is limited. Anger, defensiveness, and stubborn resistance are more likely reactions.

Under NEPA, however, an agency that attempts to grapple meaningfully with environmental issues is forced to recruit a new phalanx of professionals with values and perspectives different from its old-line operatives. As the new personnel react with the old, new sets of shared attitudes and goals may replace those that had hardened into the bureaucratic structure. Thus, NEPA is a window to the outside

19. See, e.g., E. REDFORD, *THE REGULATORY PROCESS* 22-38 (1969).

world; it brings outside comments into the decision-making process and, through the infusion of new personnel, it introduces new perspectives to the agency.

Finally, NEPA is not a toothless tiger that can be ignored whenever it suits the convenience of a federal agency. The citizen suit provides an extraordinarily flexible and effective enforcement technique, at least against administrative agencies.²⁰ The courts have been vigilant—perhaps even too vigilant—in implementing the NEPA requirements. In recent years, the courts have broadened the citizen's right to bring suit and the scope of court review of administrative actions.²¹ The willingness of the courts to vindicate environmental values means that governmental agencies must take seriously the NEPA obligation to consider environmental factors and the views of outsiders. Industry counsel, knowing that citizen groups are likely to receive a sympathetic hearing from reviewing courts, are encouraged to assist agencies in giving proper consideration to environmental values. Otherwise, industry will suffer from costly delays resulting from judicial reversal of the decisions of an overly acquiescent agency. Awareness of the ready availability of judicial enforcement of NEPA is likely to lead to cooperative enforcement of the law by agencies and industry representatives.

III. THE DANGERS OF EXCESSIVE ZEAL IN THE ENFORCEMENT OF NEPA

Initial reflection on this statutory framework leads one to ask, "Why is there so much fuss about NEPA?" The policies set forth in NEPA seem worthy enough, if not platitudinous. Cautious inclusion of terms such as "practicable,"²² "appropriate,"²³ and "to the

20. See 1971 ANN. REP. OF THE COUNCIL ON ENVIRONMENTAL QUALITY 155-70, for a discussion of the citizen suit.

21. In *Sierra Club v. Morton*, 405 U.S. 727 (1972), a recent environmental case not involving NEPA, the Court held that the Sierra Club lacked standing to contest the Forest Service's approval of a plan to construct a ski resort on national forest lands in the Mineral King Valley because the Club had failed to allege that it or its members would suffer injury in fact as a result of the proposed development. However, the Court did not question that threats to scenic, ecological, historical, or aesthetic interests could constitute sufficient "injury in fact" to confer standing under the Administrative Procedure Act, 405 U.S. at 734, and concluded that once standing was established, the plaintiff would be able to assert nonpersonal "interests of the general public" in support of his claim, 405 U.S. at 740 n.15. See also *Association of Data Proc. Serv. Orgs., Inc. v. Camp*, 397 U.S. 150 (1970); *Citizens Comm. for the Hudson Valley v. Volpe*, 425 F.2d 97 (2d Cir.), cert. denied, 400 U.S. 949 (1970); *West Virginia Highlands Conservancy v. Island Creek Coal Co.*, 441 F.2d 232 (4th Cir. 1971); *Environmental Defense Fund, Inc. v. Hardin*, 428 F.2d 1093 (D.C. Cir. 1970).

22. NEPA §§ 101(a)-(b), 42 U.S.C. §§ 4331(a)-(b) (1970).

23. NEPA §§ 102 (B), (E), 42 U.S.C. §§ 4332 (B), (E) (1970).

fullest extent possible”²⁴ suggests that the agencies have substantial discretion in administering the provisions. And the requirements for the drafting and circulation of impact statements, for solicitation of comments and the coordination of expertise, seem at first blush to be no more than the implementation of a directive to the agencies: “Before you make a major decision, think; think about what it is you are doing!”

Yet, federal agencies appear to be encountering severe difficulties in complying with NEPA as it is being construed by reviewing courts. The current travails of agency decision makers, in our view, cannot be ascribed wholly to their lethargy or perverseness; some part of the problem may be traced to a discrepancy between the nature of the decision-making process as envisioned by NEPA (or, more accurately, NEPA plus its judicial gloss) and the decision-making process as it actually occurs within a governmental agency or any other bureaucratic organization.

A. *Uncertainties in the Meaning and Application of NEPA*

1. *Application of the Impact Statement Requirement*

Section 102(2)(C) of NEPA requires “all agencies of the Federal Government” to “include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment”²⁵ a detailed environmental impact statement. NEPA, as Judge Friendly has said, is “a relatively new statute so broad, yet opaque, that it will take even longer than usual fully to comprehend its import.”²⁶ Already, however, it is apparent that “major” means “any” and that “significantly affecting” means “affecting.” Indeed, some decisions indicate that the agency bears the burden of showing that the proposed action does not meet these tests and must issue an impact statement “whenever the action *arguably* will have an adverse environmental impact.”²⁷ Given the subjective quality of the Act’s qualifying language and the breadth with which the courts have interpreted it, the issuance of environmental impact

24. NEPA § 102, 42 U.S.C. § 4332 (1970).

25. 42 U.S.C. § 4332(2)(C) (1970).

26. *City of New York v. United States*, 337 F. Supp. 150, 159 (E.D.N.Y. 1972).

27. *Students Challenging Regulatory Agency Procedures v. United States*, 346 F. Supp. 189, 201 (D.D.C. 1972) (emphasis original). See also 346 F. Supp. at 199. Another case holds that even the threshold determination of environmental impact requires affirmative steps to develop an administrative record and, in effect, a “mini-impact statement.” *Hanly v. Kleindienst*, 31 Ad. L.2d 922 (2d Cir., Dec. 5, 1972).

statements promises to become a routine occurrence in many areas of public administration.

Thus, it is difficult to imagine any action in the energy field so inconsequential that an impact statement would not be required.²⁸ Since abandonment or certification of transportation facilities is likely to affect the volume of total traffic or the share held by motor vehicles, a wide range of actions by transportation agencies is also subject to the environmental statement requirement.²⁹ Thus far only a few functions, notably the issuance of price orders under the Emergency Stabilization Act,³⁰ have been held exempt from the impact statement requirement. Even in the few cases in which an action of extremely limited environmental significance is contemplated, such as a short-term military landing exercise involving 900 Marines in a state park commonly visited by as many as 6,000 persons per day in the summer months, the searching nature of the judicial inquiry ensures that environmental issues will be adequately protected.³¹

28. See, e.g., *Greene County Planning Bd. v. FPC*, 455 F.2d 412 (2d Cir. 1972), *cert. denied*, 41 U.S.L.W. 3184 (U.S., Oct. 3, 1972) (FPC certificate for construction of an electric transmission line); *Wilderness Soc. v. Hickel*, 325 F. Supp. 422 (D.D.C. 1970), *rev'd*, Nos. 72-1796, 72-1797 & 72-1798 (D.C. Cir., Feb. 9, 1973) (Interior Department permits for the Alaskan pipeline and its related road haul).

29. In *City of New York v. United States*, 337 F. Supp. 150 (E.D.N.Y. 1972), Judge Friendly held that the ICC erred in failing to prepare an environmental statement in connection with the abandonment of 1.8 miles of a terminal rail line in the New York City area, since abandonment of the rail line would affect the environment by increasing truck traffic. Similarly, it has been held that the ICC erred by failing to prepare an adequate environmental impact statement when approving a rail rate increase affecting the relative costs of transporting recyclable and primary materials. See text accompanying notes 49-53 *infra*. The same or similar arguments are applicable to many licensing and rate proceedings in transportation agencies. One recent case, however, holds that a decision allowing a rate to go into effect without suspension and investigation is not subject to the NEPA requirements. *Port of New York Authority v. United States*, 451 F.2d 783 (2d Cir. 1971). Construction projects in metropolitan areas that threaten to increase the burden on transportation facilities may also be subject to the impact statement requirement. See *Hanly v. Mitchell*, 460 F.2d 640 (2d Cir. 1972) (construction of jail and office facilities in New York City).

30. *Cohen v. Price Commn.*, 337 F. Supp. 1236 (S.D.N.Y. 1972). The case arose on a motion for a preliminary injunction against a fare increase, and thus the opinion does not constitute a final determination on the applicability of NEPA to the Price Commission. However, the language and reasoning of the court's opinion strongly point to the conclusion that NEPA is inapplicable.

31. *Citizens for Reid State Park v. Laird*, 336 F. Supp. 783 (D. Me. 1972). The Defense Department in this case made elaborate preparations for the landing exercise, and the agreement with park authorities reflected environmental concerns, including a requirement that vehicles would be confined to existing roads. John Nolan, a Washington attorney, has wryly commented that, if the arrangements had provided for a smaller complement of chemical toilets, the decision might well have gone the other way. Remarks delivered at the ABA-ALI Course of Study on Environmental Law II at the Smithsonian Institution, Washington, D.C., Feb. 17, 1972.

2. Substantive Effect

One area of considerable uncertainty is how NEPA operates to affect the decisional equation in each agency. There is no question that NEPA requires decision-making procedures that will permit agencies to take environmental values into account. But what weight is to be given to such values when they conflict with the values expressed or implicit in the statute the agency is administering? Section 105 of NEPA simply states that the policies and goals of NEPA are "supplementary" to those set forth in the agencies' existing authorizations,³² thus providing little practical guidance.

A case in point is *Zabel v. Tabb*,³³ in which the Court of Appeals for the Fifth Circuit upheld the refusal of the Army Corps of Engineers to grant a dredging permit, when such refusal was based on ecological grounds. The applicants for the permit had argued that the Corps could refuse such a permit only when the dredging would represent an obstruction to navigation.³⁴ The court rejected this contention, basing its conclusion, in part, on NEPA.³⁵ The *Zabel* case has been interpreted to mean that "NEPA serves to aid Federal agencies which, in the absence of NEPA might be forced to operate under mandates arguably incompatible with environmentally responsible decisionmaking."³⁶

While the result in *Zabel* appears correct, we are not certain that every agency that presently has statutory authority to exercise some measure of discretion in a matter involving private rights or interests is now empowered to consider environmental factors as well as those factors relevant under the agency's basic statute. Ordinarily, when an agency is granted discretionary authority, that discretion is to be exercised within certain limits and for the accomplishment of certain statutory purposes. These limitations on agency action provide a focus for agency programs and a check on arbitrariness. They should not lightly be set aside or diluted.

Let us take an extreme example. Under the Securities Act of 1933,³⁷ most investment securities may not be sold to the general public until a registration statement conforming to the requirements of the Securities Act is filed with the SEC and in effect. A

32. 42 U.S.C. § 4335 (1970).

33. 430 F.2d 199 (5th Cir. 1970), *cert. denied*, 401 U.S. 910 (1971).

34. 430 F.2d at 203.

35. 430 F.2d at 211-13.

36. Remarks of Timothy B. Atkeson, General Counsel, CEQ, reprinted at 118 CONG. REC. E1626, 1628 (daily ed. Feb. 24, 1972).

37. 15 U.S.C. §§ 77a-77bbbb (1970).

registration statement takes effect twenty days after filing, but the Commission may, in its discretion, accelerate the effective date and ordinarily does so when it is satisfied that the statement affords adequate disclosure to prospective investors.³⁸ The dynamics of the securities market are such that a failure to obtain acceleration is quite likely to frustrate the entire offering. Does NEPA permit or require the SEC, in deciding whether or not to accelerate effectiveness of a corporation's proposal to sell stock to finance expansion, to take into account the environmental effects of the issuer's plans for expansion? Or, to give another example, may the Internal Revenue Service refuse to give a tax ruling on a proposed transaction on the ground that the transaction will have adverse environmental effects? If the Service refuses to give the ruling, the transaction may be abandoned as too risky, and the Internal Revenue Code seldom purports to distinguish between taxpayers on the basis of a transaction's environmental effects.³⁹

NEPA, in our view, is not directed at these situations. It should not be interpreted as granting to every federal agency a roving commission to defend the environment wherever its writ runs, irrespective of the nature of the subject matter before it.

Some distinctions are necessary. One of the difficulties in dealing with NEPA is that it appears to have been drafted to deal with one type of administrative decision, the big federal or federally financed project, where the government's discretion to go forward or to refrain from doing so is substantially unlimited. NEPA should be applied with caution to governmental programs that regulate what are essentially private activities. Government, of course, cannot be indifferent to the environmental effects of private action. Regulation of such action, however, is best accomplished by agencies specifically empowered to do so on a general basis, and not through a hit-or-miss system by which agencies impose conditions or restrictions extraneous to the statutory programs they are charged with administering.

3. *Legislative Proposals*

With all this ferment, it is paradoxical that the environmental impact statement has had virtually no effect as yet on the legislative process.⁴⁰ The notice-and-comment procedures envisioned by NEPA

38. 15 U.S.C. § 77(h) (1970); 17 C.F.R. § 202.3 (1972).

39. *But cf.* INT. REV. CODE OF 1954, § 169.

40. Section 102(c) of NEPA, 42 U.S.C. § 4332 (1970), provides that all agencies of the federal government shall include an impact statement in "every recommendation or

seem peculiarly well-adapted to public airing and discussion of issues raised by major legislative proposals. Furthermore, Congress is much less restricted than particular agencies in the alternatives that it can consider and act upon. Yet, fewer than two hundred environmental impact statements have been filed in connection with legislative proposals,⁴¹ and many of them have involved recent Administration proposals to improve the environment—a category of legislation that is hardly the central concern of NEPA. Surely among the thousands of bills introduced in Congress and the hundreds enacted during the past three years, there have been a great many that have had or would have had substantial and adverse effects on the environment. One reaches the reluctant conclusion that NEPA has been virtually a dead letter in this respect. Congress appears to be considering and enacting legislation even though federal agencies have not prepared and filed the required statements. The failure of Congress to observe the NEPA requirements when its own affairs are involved cannot but give comfort to those agency officials who are disinclined to take NEPA seriously.

The problem with respect to NEPA's application to legislative proposals is, of course, the unavailability of an effective enforcement mechanism. The broadened scope of judicial review at the behest of the citizen group has become accepted as a matter of course when agency action is under attack, but no court to date has had the temerity to enjoin legislation as to which an environmental impact statement was not filed or to enjoin Congress from considering a bill when the NEPA requirements have not been met. Any effort to do so would run the risk of a constitutional crisis; thus, only Congress can enforce NEPA's application to legislative proposals.⁴²

report on proposals for legislation . . . significantly affecting the quality of the human environment." The general statement in the text should be viewed in light of the fact that congressional debate on a number of important public issues—such as the supersonic transport, the Amchitka underground nuclear test, and various public works projects—has focused on environmental impact statements prepared by the concerned agencies.

41. According to information supplied to the authors by the CEQ staff, 163 impact statements on legislative proposals had been filed as of November 30, 1972.

42. The Senate Committee on Public Works, apparently alone among congressional committees, has adopted a rule that it will not consider a legislative proposal unless an environmental statement has been filed. *Environmental Defense Fund v. TVA*, 339 F. Supp. 806 (E.D. Tenn. 1972), indicates that continuing projects may run into NEPA difficulties despite long-standing congressional support. In this case, the TVA was enjoined from completing the Tellico Dam project for which Congress had appropriated funds in 1966 and which had been under construction since early 1967.

Another relevant case, *Scientists' Institute for Pub. Information v. AEC*, No. 1029-71 (D.D.C., filed May 25, 1971), is currently pending. Plaintiffs are seeking to compel

4. *Actions Subject to Rule-Making Procedures*

Because NEPA has not had a substantial effect on the legislative process, its primary application has been to (1) administrative actions that fall within the "rule making" or "adjudication" provisions of the Administrative Procedure Act (APA)⁴³ and (2) informal administrative actions that are not subject to these provisions of the APA.

The general effect of NEPA in opening up to public scrutiny many informal administrative functions that previously were not subject to any procedural requirements has already been mentioned. In essence, NEPA imposes a notice-and-comment rule-making procedure on informal administrative actions whatever their quality or character. Although there are serious uncertainties concerning whether or not any given agency action is subject to the NEPA requirements, and, if so, what the impact statement must include, the simple notice-and-comment procedure of the kind envisioned by the CEQ guidelines may be applied without undue strain to informal administrative actions. Obviously, where agency actions are already subject to the notice-and-comment rule-making procedures of the APA, there should be no difficulty in complying with the essentially similar requirements of NEPA within the framework of existing procedures.

5. *Decisions Made After a Trial-Type Hearing*

The application of NEPA, however, to administrative decisions that are required to be made on the basis of a record (whether "rule making" or "adjudication" as defined in the APA) raises more serious questions, in large part because NEPA provides that the environmental impact statement "shall accompany the [agency's] proposal through the existing agency review processes."⁴⁴ This requirement fails to reflect the variety and complexity of trial-type proceedings. Three recent federal court opinions—*Calvert Cliffs' Coordinating Committee, Inc. v. AEC*,⁴⁵ *Natural Resources Defense Council, Inc. v. Morton*,⁴⁶ and *Greene County Planning Board v.*

the AEC to file an environmental impact statement in connection with its request for congressional authorization and appropriation for the development of the liquid-metal fast breeder reactor as a source of electric power. See 1 ENV. L. REP. 65153-54 (1971).

43. 5 U.S.C. §§ 553-54 (1970).

44. NEPA § 102, 42 U.S.C. § 4332 (1970).

45. 449 F.2d 1109 (D.C. Cir. 1971).

46. 458 F.2d 827 (D.C. Cir. 1972).

FPC⁴⁷—when read together, suggest the possibility of a hair-splitting literalism in applying NEPA that is reminiscent of the technicalities of common law pleading. Most of the worrisome language in these opinions is dicta, however, and, it is hoped, will not be applied in cases involving different fact situations. But the direction of some judicial thinking is sufficiently troublesome to warrant a word of caution.

In *Greene County*, which involved a Federal Power Commission proceeding for certification of a short transmission line connecting an existing pumped storage facility to another part of the utility's distribution system, intervenors opposing certification of the line on environmental grounds challenged the failure of the Commission staff to prepare and circulate its own draft environmental impact statement prior to the evidentiary hearing on the application. The utility had, as required by FPC rules, submitted a proposed environmental impact statement in support of its application. While the FPC's rules in effect at the time required the Commission staff to prepare its own draft impact statement in uncontested cases, the procedure in contested cases was for the staff to review the applicant's statement as to sufficiency of form and to circulate it for comment to other interested agencies, but not to prepare a draft statement prior to the hearing. The court held that the agency could not accept the utility's proposed statement as the draft environmental statement that must be made available prior to the hearing.⁴⁸ The agency staff must draft its own statement whether or not the issues to be canvassed at the formal hearing are fully revealed in the applicant's statement.

This result seems questionable. While it is doubtless appropriate to place a burden on the agency to consider and prepare its own final environmental statement, the question prior to the hearing should be viewed as one of adequate notice to other governmental agencies and potential intervenors. NEPA is not intended to restructure the agency decision-making process. NEPA takes the agency review process as it finds it and simply requires that the environmental statement accompany the proposal through that process. If that process is one in which the proposal originates outside the agency and in which the staff may assume a neutral posture or even not participate at all—as in many ICC proceedings—why is not a draft statement from the proponent of the action sufficient?

No satisfactory answer to this question can be found in the

47. 455 F.2d 412 (2d Cir. 1972), *cert. denied*, 41 U.S.L.W. 3184 (U.S., Oct. 3, 1972).

48. 455 F.2d at 421-22.

Greene County opinion, or in the similar decision in *Students Challenging Regulatory Agency Procedures v. United States*.⁴⁹ The *SCRAP* case involved an ICC decision allowing rates affecting the shipment of recyclable materials to become effective for a limited period of time. The court concluded that the carriers' "self-serving" analysis of environmental impact could not be an adequate basis for the ICC action⁵⁰ and that "the Commission's own investigative apparatus" must be used "to uncover possible environmental effects of the action."⁵¹ While the holding in this case is distinguishable from *Greene County* in that it was based upon the inadequacy of the agency's final impact statement rather than the draft statement,⁵² the cases are similar in demanding of the agency staff independent and active consideration of the environmental issues at every stage of the proceeding. This attitude is also reflected in the court's statement, made in response to the ICC's contention that the procedures mandated by NEPA are too slow and cumbersome to apply to temporary rate increases, that the Commission had not satisfied its "heavy burden of proof" in attempting to show that full compliance with NEPA was impossible.⁵³

The *Calvert Cliffs'* case, taken in conjunction with *Greene County*, may be read to suggest that a mandatory hearing must be held in a license or certificate proceeding even though the staff and the parties are in full agreement that no environmental issues are presented and there are no intervenors who seek to contest the application on environmental grounds. Thus, Judge Wright's opinion in *Calvert Cliffs'* states that in "uncontested hearings" the agency must give careful examination to the draft statement to determine whether staff review has been adequate, and "it must independently consider the final balance among conflicting values that is struck in the staff's recommendation."⁵⁴ It must be emphasized, however, that *Calvert Cliffs'* involved the Atomic Energy Act, a statute that provides for a mandatory hearing before a license to construct a power plant is issued.⁵⁵ Consequently, it is doubtful that the court

49. 346 F. Supp. 189 (D.D.C. 1972).

50. 346 F. Supp. at 193 n.4.

51. 346 F. Supp. at 194-95 n.8.

52. The portions of the opinion discussing the adequacy of ICC draft impact statements and the role of the staff relate to agency decisions which were held to be either moot or not ripe for review; however, the opinion as a whole reflects basic agreement with the *Greene County* approach.

53. 346 F. Supp. at 199.

54. 449 F.2d at 1118.

55. 42 U.S.C. § 2239(a) (1970).

intended to imply that a hearing is required on uncontested environmental issues when, under the agency's practice, a hearing would not be required on other uncontested issues.

When agency procedures provide for hearings on contested issues, what kind of dispute is necessary to force a hearing on environmental issues? Here, *Calvert Cliffs'* casts a long shadow. There is, after all, little that man can do to his environment that would be regarded by all as an unalloyed benefit. It is hard to imagine construction of any utility plant or facility that would not involve some environmental minuses, at least on aesthetic grounds. Thus, the action of a federal agency in approving such construction will typically, almost invariably, involve acceptance of a trade-off: power for scenery, air pollution, radiation, or what have you. What happens when an environmentalist does not dispute the basic data put forward in the utility's proposal or environmental statement, but disagrees as to the agency's ultimate decision? Or, perhaps, the environmentalist urges consideration of an alternative. Can he force a hearing?

The cases have not yet answered this question, but if one takes as a point of departure the views of Judge Wright that "all possible environmental factors [must be included] in the decisional equation" in order to achieve "a rather finely tuned and 'systematic' balancing analysis in each instance,"⁵⁶ and that "[c]onsiderations of administrative difficulty, delay or economic cost will not suffice to strip [section 102 of NEPA] of its fundamental importance,"⁵⁷ then any objecting party with a spark of imagination should be able to force a full evidentiary hearing. Yet, surely there is a need for flexibility here. One does not need a scale to determine that an elephant weighs more than a horse. Agencies should be permitted to require some sort of threshold showing by environmentalists that the balance on a particular proposal is likely to be reasonably close and to turn on disputed questions of fact before a hearing becomes mandatory. After all, trials are expensive and time-consuming, and, at best, an imperfect tool for reaching value judgments with respect to environmental issues. However elaborate the decisional process, the principal ingredients cannot really be reduced to a common denominator. Even the most finely tuned and systematic balancing analysis must rely in large part on factors that defy precise measurement.

It seems ironic that a statute designed to produce a rational

56. 449 F.2d at 1113.

57. 449 F.2d at 1115.

agency decision-making process, in which competing values are balanced in a considered fashion, should itself be interpreted to contain requirements that cannot be balanced against opposing considerations such as "administrative difficulty, delay or economic cost." Yet this is the view of NEPA one finds in the *Calvert Cliffs'* and *Greene County* opinions, a view only partially qualified in *Natural Resources Defense Council, Inc. v. Morton*. In this last case, Judge Leventhal concluded that NEPA's requirement that alternatives be discussed must be interpreted under a "rule of reason."⁵⁸ One might further hope that reasonableness will also hold sway in assessing the procedures employed by agencies in applying the NEPA requirements to the highly variegated administrative universe.⁵⁹

B. *Disadvantages of Requiring an Unrealistic Exploration of Consequences and Alternatives*

In *Calvert Cliffs'*, the District of Columbia Circuit rebuffed an attempt by the AEC to simplify its environmental decision-making in nuclear plant license proceedings by adopting a rule foreclosing consideration of the effects of thermal pollution on water quality if the proposed discharges would not violate the water quality standards administered by the state in which the plant was to be operated and were approved by the Environmental Protection Agency (EPA). The rule was struck down, not merely because the court felt it represented an abdication to the state agency of the AEC's NEPA responsibility, but, more significantly, because the court read NEPA to require "a case-by-case balancing judgment"⁶⁰ by federal agencies. Judge Wright stated:

In each individual case, the particular economic and technical benefits of planned action must be assessed and then weighed against

58. 458 F.2d at 834.

59. A recent decision on remand of the *Natural Resources Defense Council* case to the district court suggests an even further refinement for those who wish to adopt the strategy of delay. When an agency amends a draft environmental statement to discuss issues not previously considered, the ninety-day period provided by the CEQ guidelines for notice-and-comment to other governmental agencies and members of the public runs anew. In common law pleading terms, the variance is fatal and the exhausted pleader must start afresh, as the Secretary of Interior then did. Secretary Morton, however, was not content with his fate. The newspapers carried stories of his "bitter disappointment" over court decisions that have delayed governmental programs aimed at developing natural resources and have tended, in his view, to shift governmental responsibilities from executive departments to the judiciary "where the criteria and understanding so requisite for fundamental resource decisions do not exist." Washington Evening Star, Feb. 10, 1972, at A-3.

60. 449 F.2d at 1123.

the environmental costs; alternatives must be considered which would affect the balance of values. The magnitude of possible benefits and possible costs may lie anywhere on a broad spectrum The point of the individualized balancing analysis is to ensure that, with possible alterations, the optimally beneficial action is finally taken.⁶¹

While, in theory, it may be desirable for each governmental decision having a significant environmental impact to be reached after thorough exploration of the consequences and individualized balancing among all available alternatives, such a requirement imposes a great and perhaps intolerable strain on the decision-making process.

The decision-making process involved in these cases is exceedingly complicated.⁶² Typically, it involves trade-offs among values, many of them impossible to quantify. Perhaps air or water pollution can be decreased through a change in plant design involving considerable additional costs. Perhaps decreased water pollution can be accomplished at the expense of greater air pollution, or vice versa. Quite possibly, objectionable pollution is unavoidable unless a different site is selected. Perhaps the project can be substantially altered or abandoned entirely. Each of these choices brings different consequences in its train.

Any decision maker must attempt to reduce his more complicated decisions to manageable size. Usually Congress helps by providing directives or policy guidance in statutes governing specific programs. For example, statutory directives do not require the Department of Agriculture to recalculate the long-range effects of various crop support programs before deciding the allowable acreage in a given year. The Department of Transportation, unfortunately in our view, is not free to decide that we have enough highways and therefore the highway trust fund should be spent for something else. Agency administrators, through regulations, directives, and the like, attempt to guide future implementation of their programs, not merely to inform and to instruct their less enlightened subordinates, but to enable the business of the agency to go forward without an endless re-examination of first principles. NEPA does not, of course, explicitly require such a continuous re-examination of first principles. What it does do, in the view of Judge Wright in *Calvert Cliffs*,⁶³ is require a consideration of alternatives as part of an "individualized balancing analysis [leading to an] optimally beneficial action."⁶³

61. 449 F.2d at 1123.

62. See Boyer, *Alternatives to Administrative Trial-Type Hearings for Resolving Complex Scientific, Economic, and Social Issues*, 71 MICH. L. REV. 111 (1972).

63. 449 F.2d at 1123.

But when program values are viewed as in constant and fluid competition with environmental values, first principles can never be very firmly established.

Certainly, analysis of the environmental impact of a proposal must involve consideration and evaluation of alternatives. But to select among alternatives, one must be able to measure their relative merits in terms of some standard or objective, the validity of which is assumed. Such a standard or objective represents in itself a choice among alternatives that has presumably been made at an anterior point in time, perhaps at a higher governmental level, on the basis of another and more general norm.

For example, what is the range of alternatives that the AEC should consider in the context of a particular licensing proceeding?⁶⁴ Clearly, the desirability of particular design changes in the plant should be investigated. Possibly it would be useful to evaluate alternative sites for the plant in the same general area. Should the AEC also consider whether the locality would be better off environmentally with a fossil fuel plant? If so, should it consider the environmental disadvantages of oil spills or strip mining where the fuel is produced? Should the AEC consider whether it would be preferable to provide power by transmission from other areas or even whether the community should do without the additional power capacity? The *Calvert Cliffs*' opinion does not discuss at any length what range of alternatives the AEC must consider, since that question was not before the court. But an outgrowth of that decision may be to encourage public intervenors in AEC licensing proceedings to raise issues related to the merits of alternative sites or to the technical feasibility of available alternative sources of power—a development that could lead to a geometric increase in the factual questions to be resolved in each proceeding.⁶⁵

This question regarding alternatives presents particular diffi-

64. See Cramton, *Trial-Type Hearings in Nuclear Power Plant Siting*, 58 VA. L. REV. 585 (1972), for a brief discussion of current procedural problems in AEC licensing and regulation.

65. See generally Murphy, *The National Environmental Policy Act and the Licensing Process: Magna Carta or Coup de Grace?*, 72 COLUM. L. REV. 963 (1972). The *Greene County* case requires that issues discussed in the draft environmental statement be open for testimony and cross-examination at the hearing:

[W]e deem it essential that the Commission's staff should prepare a detailed statement before the Presiding Examiner issues his initial decision. Moreover, the intervenors must have a reasonable opportunity to comment on the statement. But, since the statement may well go to waste unless it is subject to the full scrutiny or the hearing process, we also believe that the intervenors must be given the opportunity to cross-examine both [utility] and Commission witnesses in light of the statement

455 F.2d at 422.

culties when, as in the AEC situation, agency action is required to be taken only after a formal trial-type proceeding. As long as the agency procedure is informal and managerial in nature, the agency can control to a great degree the extent to which alternatives are explored, can rely on other agency evaluations, and can terminate an inquiry when it appears that the alternative is unlikely to prove feasible. In a formal trial-type proceeding with adversary parties, it is extremely difficult for the presiding officer to limit evidence or questioning regarding available alternatives and their environmental consequences. Nor can complicated issues be broken down easily into subunits and resolved separately. Indeed, as a protection against judicial review, an officer conducting a formal hearing is generally well advised to permit the parties to get anything they desire into the record even though the end result is more data than any human mind can comprehend.

The decision of the District of Columbia Circuit in *Natural Resources Defense Council, Inc. v. Morton* adds a new dimension to the problem of alternatives. In that case, the court held that the Interior Department's impact statement, filed in connection with a proposal for a sale of offshore oil and gas leases, was deficient because it failed to consider adequately the possibility of eliminating oil import quotas as a means of supplying needed fuel. While conceding that NEPA required only the consideration of "reasonably available"⁶⁶ alternatives, the court rejected the government's contention that "availability" is measured by the authority of the agency in question to put the alternative into effect.⁶⁷ This approach goes well beyond *Calvert Cliffs*' and in one respect contradicts it. In *Calvert Cliffs*', the court emphasized that the impact statement must not merely "accompany" the proposal through the agency process, but rather must actually be taken into account in agency decision-making.⁶⁸ *Natural Resources Defense Council*, however, apparently envisages a discussion of alternatives that are beyond the power of the decision maker to effect.⁶⁹

66. 458 F.2d at 834.

67. 458 F.2d at 835.

68. 449 F.2d at 1117-18.

69. Alternatives that an agency is powerless to adopt may, of course, serve as a basis for a refusal to act. But can the AEC, for example, which is charged by statute with the duty to promote the peaceful use of atomic energy, refuse to license nuclear power plants on the ground that the Interior Department should supply the needed energy by expanded off-shore oil leasing, or that the states should abandon oil rationing, or that the President and Congress should eliminate the oil import quota program? Would not such a decision be viewed as a grave dereliction of duty? The absence of a national energy policy and an all-powerful agency to administer it cannot

We must bear in mind the inherent limitations on the capacity of a complex bureaucracy to explore alternatives. In arguing for the necessity of making decisions through successive limited comparisons—the “science of muddling through”⁷⁰—Charles Lindblom has written:

Nothing would be more paralyzing to an administrator than to take seriously the prescription . . . that he make no decision until he [has canvassed] all possible alternative ways of reaching well formulated goals, making sure that he has investigated every possible alternative. He can only “get a little outside” his regular routine by practicing some strategy that gives him some direction without asking for the impossible.⁷¹

Proposals for agency action generally filter up from below or from the field; they are, and must be, shaped primarily by known statutory and programmatic goals. In some situations, such as license applications, the request or proposal is not even initiated by the agency itself, and the agency may have no authority either to compel acceptance of an alternative or to ensure approval by another governmental authority.

The requirement of considering alternatives raises another problem that goes to the heart of the NEPA structure. One of the basic rationales for the broad delegation of discretionary authority to administrative agencies is their presumed expertise. This presumption may be a legal fiction to some extent,⁷² but there is certainly validity to the proposition that agencies can make more informed judgments with respect to subjects with which they regularly deal than with respect to subjects beyond their experience. Yet, in considering the range of alternatives, the agencies have been thrust into areas beyond their specialized knowledge. It is true that they may look to more expert agencies for assistance and advice, but the final decision, the task of individualized case-by-case balancing, rests with the agency responsible for the proposed action. It may well be argued that prior to NEPA agencies were constantly making

be viewed by one agency as an excuse for not pursuing the narrower mandate that Congress has given the agency. NEPA does not mandate what can only be viewed as “government by impasse.”

70. See Lindblom, *The Science of “Muddling Through”*, in READINGS ON MODERN ORGANIZATIONS 154 (A. Etzioni ed. 1969) [hereinafter READINGS].

71. *Contexts for Change and Strategy: A Reply*, in READINGS, *supra* note 70, at 172.

72. Cf. Chief Judge Bazelon’s comment in *Environmental Defense Fund, Inc. v. Ruckelshaus*, 439 F.2d 584, 597-98 (D.C. Cir. 1971), to the effect that courts should not be “taken in” by the supposed “expertise” of agencies, which may confuse expertise with policy or use it in the service of special interests.

decisions with consequences they were ill-equipped to foresee or evaluate, and that NEPA at least focuses efforts in the right direction. The problem is probably manageable enough in the context of informal procedures. However, difficulties are foreseeable in formal proceedings where agency comments must presumably be tested by the rules of evidence.⁷³

We have pointed out before that NEPA's basic approach is to take the agency decision-making process as it finds it, and essentially to require that environmental considerations be factored into agency determinations in whatever forum and at whatever level they are raised. Many of the difficulties we have considered here seem traceable, at least in part, to NEPA's tacit and, we suggest, over-optimistic assumption that existing decision-making processes are, in a sense, elastic and can be stretched to accommodate the infusion of new and complex issues without losing their essential character. But agency modes of decision-making are not devised in a vacuum. For the most part, they are designed to be responsive to the kinds of issues the agency is called upon to resolve. If there is a dramatic change in the number and the nature of the issues to be resolved, as has happened since the enactment of NEPA, it cannot be assumed that the old modes of decision-making can easily be adapted to handle the new subject matter.

Nowhere is this point more evident than in trial-type hearings. Such proceedings work best when issues are few and narrowly defined, ideally when the proceeding is intended to ascertain the facts to which previously announced principles of law or policy will be applied. Procedures in many agencies, of course, departed from this ideal long before the enactment of NEPA, and complaints are numerous of the rambling formlessness of hearings when voluminous questions of fact, law, and policy are sought to be resolved in a single proceeding.

Our point is that trial-type hearings and, perhaps to a lesser extent, the more informal modes of bureaucratic decision-making are generally designed to apply settled principles to situations differing only marginally from those previously encountered. Such modes of

73. In *Greene County* the court stated that the FPC could not "fulfill the demanding standard of 'careful and informed decisionmaking' [of NEPA if it] can disregard impending plans for further power development. . . . [W]e cannot tolerate the Commission cutting back on its expanded responsibility by blinding itself to potential developments notwithstanding its lack of authority to compel future, alternate construction." 455 F.2d at 424. If evidence and cross-examination must be allowed on issues, even though they are not within the power of the agency, the hearing in fact will be devoted to issues that are irrelevant in the fundamental sense that the agency cannot act upon them (except by denying the application).

"incremental" decision-making are frequently ill suited for resolving such cosmic issues as those with which NEPA is forcing the agencies to grapple.

Some basic rethinking of program goals and their environmental effects is in order, as well as some basic restructuring of the governmental apparatus to achieve better coordination of these goals. It may well be that new formats for decision-making need to be devised, but this rethinking and restructuring cannot be accomplished by judicial fiat and cannot come all at once. In the meantime, society must be prepared to accept those ordinary decisional processes that operate within fairly narrow ranges of alternatives.

Finally, attention needs to be given to the reference in *Calvert Cliffs*⁷⁴ to the goal of selecting "the optimally beneficial action." Perhaps too much should not be made of this language.⁷⁴ Everyone would agree that a major goal of NEPA is to provide a procedure that permits agencies to make more informed decisions as to "optimally beneficial action," and it may be that the court meant to suggest no more than that. It would be a mistake, however, for the courts to regard NEPA as a mandate to the agencies to act in each case in strict accord with the scientific method and the dictates of pure reason. We would do well to recall the French saying, "The best is the enemy of the good." Any administrator knows that to be able to act with full knowledge of the available alternatives and their consequences is an unobtainable luxury. Usually he must act without any great confidence that his choice is the "optimally beneficial" one, and perhaps even with no more than an intuition that his selection is marginally better than continued inaction.

It is inevitable in our political system that many significant decisions will represent compromises of one kind or another. These compromises will reflect not only a balancing of rational values, but frequently the vectors of contending forces. We do not believe that NEPA requires decisions on federal projects or expenditures to be made without regard for the views of influential congressmen, the power of contending interests, and the intensity of feeling of constituent groups.⁷⁵ NEPA, in short, does not inaugurate the reign of the

74. Yet the phrase appears twice in the opinion: "most intelligent, optimally beneficial decision," 449 F.2d at 1114, and "optimally beneficial action," 449 F.2d at 1123.

75. While administrative agencies should be required to give reasons for their actions and cannot make choices that are whimsical or violative of constitutional standards, their policy conclusions may properly contain large elements of intuition, popular emotion, or prudent compromise. This is particularly true when Congress has failed to place the decision-making process in a judicial mold by requiring that it be made "on the record after opportunity for a hearing." Cf. 5 U.S.C. § 554 (1970). In a democracy, the policy choices reached by political institutions cannot invariably be disinter-

philosopher-king; it would be wrong and ultimately futile to hold the agencies to such a standard.

IV. THE JUDICIAL FUNCTION UNDER NEPA

An important and much disputed issue is the extent to which the judiciary should be relied upon for major decisions of environmental policy. The traditional formulas of judicial review limit a court's role to consideration of questions of law, abuse of discretion, or lack of adequate evidence. Thus, administrative action taken in violation of a procedural requirement must be reversed and remanded for further proceedings. An agency must demonstrate that a novel and important policy or program is within its legislative authorization. If a decision is taken on the basis of a record, the agency's conclusion must find a reasoned basis in substantial evidence revealed in the light of the whole record. The tasks imposed on the judiciary by these formulas are not wooden or limited, but require the utmost of wise and creative judgment.

We do not believe, however, that it is the function of a reviewing court to balance the conflicting values that have been placed by the legislature in the hands of administrators. While we are all aware of the fashionable theories that administrative agencies are either captives of those whom they regulate or wedded to the promotional missions that led to their creation,⁷⁶ it is neither sound theory nor prudent practice to place primary reliance on the judiciary to supervise governmental action in the environmental field. The courts may occasionally preserve the status quo in instances where improper agency action threatens to disturb it, but administrative agencies are needed to provide the motive power for necessary alterations of the status quo.

The American experience suggests that agencies and administrators are capable of effective action; indeed, even the alteration of the American environment of which environmentalists complain is due in part to the efficient efforts of administrators pursuing other missions. Effective action to preserve and protect environmental values, such as the design and administration of a rational system of pollution standards or charges, is dependent upon the sustained and ener-

ested, perfectly rational, or even internally consistent. It is enough that they have been arrived at by means of an appropriate and rational process. The "Three Sisters Bridge Case," *D.C. Federation of Civic Assns. v. Volpe*, 459 F.2d 1231 (D.C. Cir. 1971), *cert. denied*, 405 U.S. 1030 (1972), appears to impose requirements that may be appropriate for judicial or quasi-judicial proceedings but are quite out of keeping with the nature of the decision-making there involved.

76. See generally Cramton, *The Why, Where, and How of Broadened Public Participation in the Administrative Process*, 60 GEO. L.J. 525, 525-30 (1972).

getic efforts of administrators. The courts cannot perform such functions.

Environmentalists should remember that freewheeling judicial review, like the NEPA requirements themselves, is a two-edged sword. Industry representatives desiring to preserve a status quo favorable to their continued exploitation of natural resources may bring their own suits to restrain and delay governmental actions, relying on precedents set in the victories of the environmentalists. In *National Helium Corp. v. Morton*⁷⁷ an industry group utilized NEPA to block a Department of the Interior action that would have terminated helium leases. NEPA has also been used to make broad attacks on the EPA regulatory program for implementing the Clean Air Act,⁷⁸ and the Corps of Engineers' discharge permit program under the Refuse Act.⁷⁹ While the challenge to the Refuse Act permit system has become academic as a result of provisions in the 1972 Water Pollution Control Amendments transferring these functions to the EPA and exempting them from NEPA,⁸⁰ there are still many areas in which NEPA can be used to delay environmental protection as well as to enforce it. And it might well be asked why it was thought necessary to exempt the EPA from the requirements of the Act. Certainly the decisions of this agency have a more direct and immediate effect on the environment than the actions of most other sectors of government, and it possesses environmental expertise far beyond that available to other agencies. Nor can it be a sufficient answer to say that the EPA should be exempted because its primary

77. 326 F. Supp. 151 (D. Kan. 1971).

78. In *Getty Oil Co. v. Ruckelshaus*, 342 F. Supp. 1006 (D. Del. 1972), the court rejected a NEPA challenge to a compliance order issued by the Administrator of the EPA pursuant to the Clean Air Act, 42 U.S.C. §§ 1857-571 (1970). The court assumed without deciding that NEPA applied to EPA approval of a state implementation plan, but concluded that the claim of noncompliance with NEPA in approving the plan could not be raised by attacking the compliance order. In addition, the court noted that the Administrator had no discretion to waive the standards for sulphur content of fuel established by statute, and that compliance with the impact statement requirement of NEPA in exercising prosecutorial discretion whether to institute enforcement proceedings "would unnecessarily impede effective enforcement of the Clean Air Act." 342 F. Supp. at 1022.

See also 1972 ANN. REP. OF THE COUNCIL ON ENVIRONMENTAL QUALITY 255:

In at least three cases, representatives of the cement, chemicals, and electric power industries have challenged EPA's regulations limiting air pollution emissions from new industrial plants. The companies argue that the regulations are major Federal actions that significantly affect the environment; therefore 102 statements are required. . . . [R]egardless of how [these cases are] resolved, business can be expected to challenge other regulatory actions of the Government.

One court has held that the EPA is required to issue an environmental impact statement in promulgating air pollution regulations. See *Wall St. J.*, Dec. 8, 1972, at 7, col. 1.

79. *Kalor v. Resor*, 335 F. Supp. 1 (D.D.C. 1971).

80. Federal Water Pollution Control Act §§ 402(a)(4), 511(c)(2), added by Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, § 2, 86 Stat. 816.

mission is to protect the environment. The law neither requires nor expects the EPA to give single-minded devotion to environmental considerations. Many decisions confronting the EPA in the water pollution field involve trade-offs between environmental and economic values where broad input is desirable, and a variety of pressures will be felt by the regulators. If one regards the NEPA impact statement procedure as truly workable and efficient, there appears to be no substantial reason for exempting the agency that is most concerned with environmental problems.

One detects in the desire of some environmental groups for an ever broader scope of judicial review under NEPA a deep suspicion of the intentions and capabilities of government. This suspicion is understandable and by no means baseless, but the environmental problems we face today cannot be dealt with by governmental immobility and inaction. Affirmative programs are required. A proper concern with unleashing the motive power of government to regulate industry and natural resources supports the conclusion that the brake of judicial review should not be too easily or too strongly applied.

V. CONCLUSION

NEPA has been a force for constructive change in the federal government. Its action-forcing character, which has served to institutionalize new inputs and perspectives, has made federal agencies more sensitive to environmental considerations and nudged them toward a decision-making process that embraces a broader spectrum of values. It is hoped that federal agencies will seize the opportunity for improved decision-making that NEPA has thrust upon them. In areas such as transportation and energy, where national policy is confused in content and diffused in administration, the President and Congress will need to rethink fundamental questions and examine a broad range of regulatory alternatives. In the meantime, reviewing courts should accord individual agencies, each of which has only limited capacity to weigh competing values or to consider broad alternatives, a substantial degree of discretion in the scope, timing, and manner in which alternatives are examined and policies reconsidered. NEPA should not be viewed as requiring that the processes of government come to a standstill until all first principles are re-examined. NEPA is a constant pressure in the right direction, but it cannot in itself provide the organizational structure or the intelligence and judgment that are prerequisites for needed change. You can lead a horse to water, but